IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SANDRA JONES,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CASE NO. 5:16-cv-00154-OLG
	§	
R.G. BARRY CORPORATION,	§	
	§	
Defendant.	§	

PLAINTIFF'S RESPONSE TO R.G. BARRY CORPORATION'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

1. Statement of the Case

After more than 32 years of employment, on Friday, January 2, 2015, Defendant R.G. Barry Corporation scheduled a conference call with Plaintiff Sandra Jones and unexpectedly terminated her employment. During the Friday telephone call, Defendant told Jones her position of Operations Manager was being eliminated due to significant financial challenges being faced by the company. On Monday, January 5, 2015, Chief Executive Officer Greg Tunney sent a message to the entire company claiming Jones (DOB 1957) had retired on December 31, 2014, and announcing the Operations Manager position had been given to a substantially younger male employee Seth deVlugt (DOB 1988).

Having seen the discriminatory treatment of older employees, referred to as "seasoned" employees by CEO Tunney, and the discriminatory treatment of women by Defendant, Jones filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). In response to the charge, Defendant claims Jones was terminated because she refused to move to the corporate headquarters in Ohio or the distribution center in California and as a result her duties as Operations Manager were absorbed by employees in Ohio. Defendant alleged the remaining day-to-day operational issues Jones was handling were reassigned to deVlugt.

In its motion for summary judgment, Defendant does not allege Jones could have remained in her position if she moved, because the management employees involved in the termination all testified differently as to whether Jones would have been retained if she agreed to move. Defendant now claims in its motion, the Operations Manager position was redefined and Jones was not qualified for the new Operations Manager position, based on the Statement of Position Responsibility for the Operations Manager position created in December 2014. Defendant alleges Jones could not be given the position, because the new position included qualifications that Jones does not possess, including a bachelor's degree and an in-depth knowledge of information technology concepts and processes. However, the new position also includes the requirement of 3 to 5 year's experience in a Logistics and Operational management role and a minimum of 3 years of increasingly responsible experience, including experience successfully managing various projects, which deVlugt did not have at the time he was promoted into the position of Operations Manager.

Finally, while Defendant claims the Operations Manager position was redefined, in reality, it was the same position held by Jones, as confirmed by the Statement of Position Responsibility and by Kathleen Woods, the management employee who supervised Jones when Jones was Operations Manager and who took over the position of Operations Manager when deVlugt resigned in September 2016.

2. Disputed Material Facts Which Preclude the Granting of Summary Judgement

A. When the San Angelo, Texas Distribution Center closed in April 2012, Jones was in a transitional role as Distribution Center Manager, but Chris Dickson changed that role to Operations Manager after he was hired in October 2012.

As stated by Defendant, Jones began working for R.G. Barry on September 7, 1982, when she was 25 years old. She worked in the San Angelo, Texas sewing factory then in the San Angelo, Texas distribution center, where she eventually became the Distribution Center Manager.

In April 2012, the San Angelo Distribution Center was closed and Jones remained employed with Defendant as the Distribution Center Manager to handle the transition to the third-party logistics provider UTi Transport Solutions (UTi), located in California. Glenn Evans, Senior Vice President of Global Operations, testified he expected to keep Jones on a temporary basis, to last no more than 18 months. (Exhibit 5, Page 10)

A material dispute in the evidence arises between the parties as to whether Jones continued on a temporary basis after Chris Dickson, Vice President of Logistics, was hired by Defendant in October 2012. (Exhibit 3, Page 6) Dickson testifies he was told by Evans that Jones was temporary for another 6 months, which would be approximately April 2013. (Exhibit 3, Page 9) At the time Dickson was hired, Jones was still working on the transition to UTi. (Exhibit 5, Pages 17-18)

Believing the position of Distribution Center Manager to be temporary, Dickson worked aggressively trying to create Jones a new position. (Exhibit 3, Pages 12-13) As a result, Jones was given the position of Operations Manager (Exhibit 4, Page 12) and began reporting to Kathleen Woods (Exhibit 3, Page 13) Even though Woods was supervising Jones, no one ever told Woods that Jones's position was temporary. (Exhibit 4, Pages 9-11) Defendant's Exhibit C-5 is the Performance Review Form prepared by Woods showing Jones was performing as the Operations Manager for the period of July 1, 2013 to June 30, 2014. Evans agrees that he discussed with Jones the need to look at what Defendant needed done and whether Defendant could justify keeping her position. (Exhibit 5, Page 37) Therefore, as Operations Manager Jones continued to perform projects for Defendant, including assisting with the closure of the Portland, Oregon Distribution Center in January 2014, and the transition of that operation to UTi. (Exhibit 1, Page 97; Exhibit 5, Pages 12-13) Evans testifies he discussed with Jones in the summer of 2014 the decision to put her position of Operations Manager into the July 2014 - June 2015 budget. (Exhibit 5, Pages 42-43)

Under the employment-at-will doctrine, employees have no guarantee of continued employment. Defendant argues that the position held by Jones was even more temporary than an at-will position, being subject to elimination as soon as Jones completed the transition from the San Angelo, Texas Distribution Center to UTi. The question before the Court in this case is whether after almost 3 years and a change in job title and job duties, Jones still served in a temporary transitional position or if Defendant had modified her position. Jones asserts there is a genuine issue of material fact as to whether Jones had transitioned into the more permanent position of Operations Manager.

B. In January 2015, Defendant did not eliminate the Operations Manager position held by Jones, instead it was given to a substantially younger male Seth deVlugt.

Late in December 2014, the decision was made to terminate Jones from employment with Defendant. Dickson learned about the termination a week or two before it occurred on January 2, 2015. (Exhibit 3, Page 21) Dickson sent an invite to Jones that there was going to be a telephone call on Friday, January 2, 2015. Evans, Dickson, and Woods were on the call with Jones. (Exhibit 3, Page 23) Jones was told the position of Operations Manager was being eliminated and her job duties were being disseminated to other people within the organization. (Exhibit 3, Page 24; Exhibit 4, Page 31)

On Monday, January 5, 2015, CEO Tunney sent a message to every employee in the company telling them Jones retired December 31, 2014, and deVlugt had been assigned the duties previously handled by Jones, and wishing deVlugt success in his new position. (Exhibit 10) Also on Monday, January

5, 2015, deVlugt was promoted into the position of Operations Manager. (Exhibit 11) Defendant had only one Operations Manager position. (Exhibit 5, Page 28)

Defendant claims the position of Operations Manager was eliminated in January 2015, and the duties were distributed with compliance responsibilities being outsourced to Smyth, management of UTi's operations being eliminated as UTi was expected to handle those functions on its own, Dickson absorbing duties relating to budgeting of UTi , and deVlugt absorbing the remaining day-to-day operational duties that Jones held.

Dickson testified that when he was hired Jones was responsible for the operations and daily performance of UTi. (Exhibit 3, Page 8) Contrary to the assertion by Defendant, there was never a time when UTi was handling everything on their own. (Exhibit 3, Page 19) Evans testified only small parts of Jones's duties were going to deVlugt (Exhibit 5, Page 28), yet deVlugt's title changed to Operations Manager and he was given a promotion. (Exhibit 11) However, Dickson stated in deVlugt's performance evaluation of 2015 that the success/failure of Uti was in direct correlation to deVlugt's performance. (Exhibit 12)

Woods is in the best position to know what Jones did and what deVlugt did, because she supervised Jones when Jones was Operations Manager (Defendant's Exhibit C-5) and she took over the duties of Operations Manager when deVlugt quit in September 2016 (Exhibit 2, Page 50). Woods testifies that deVlugt took over the duties of Jones and there was no difference between what Jones was doing before she was terminated and what deVlugt was doing after Jones was terminated (Exhibit 4, Pages 32-33)

After the termination of Jones, Woods went to speak with Yvonne Kalucis in Human Resources about the termination. Kalucis told Woods the project manager position held by deVlugt was actually the position that was eliminated. (Exhibit 4, Page 40) At that time, Kalucis told Woods that Defendant had to pick someone and who would Woods rather pick an up and comer or Jones. (Exhibit 4, Page 40)

There is a genuine issue of material fact as to whether Defendant has been truthful in its stated reason for terminating Jones, elimination of the Operations Manager position, or whether the stated reason is false and thus pretext for discrimination.

C. Seth deVlugt was not qualified for the position of Operations Manager.

Defendant claims the Operations Manager position was redefined. Defendant asserts Jones was focused largely on helping UTi with day-to-day shipping operations, while deVlugt was focusing on supply chain financial and operational expectations. Defendant created a Statement of Position Responsibility for the position of Operations Manager in December 2014. (Exhibit 9) Defendant did not produce a similar Statement of Position Responsibility for the Operations Manager position before December 2014. Contrary to Defendant's claims, the primary responsibility of the Operations Manager position as of December 2014 was the ongoing operational coordination and management of all distribution, warehousing and operations with UTi. The first duty and responsibility listed on the new job description is to act as primary interface for daily coordination between UTi and Defendant. (Exhibit 9)

Defendant claims deVlugt is better qualified for the Operations Manager position because: (1) he has a degree and Jones does not, (2) his previous performance appraisal was better than the performance appraisal of Jones, (3) he had significant experience with software and other information technology, including prior experience as an information technology recruiter, and (4) he had more knowledge about Simparel.

Jones admits she does not meet the degree requirement which was added to the Operations Manager position description in December 2014. But deVlugt does not meet the requirement of 3 to 5 year's experience in a Logistics and Operational management role and a minimum of 3 years of increasingly responsible experience, including experience successfully managing various projects. (Exhibit 9)

According to deVlugt's Employment Application submitted on November 28, 2011, he graduated in June 2011 and was employed by Insight Global Inc. as an Information Technology Recruiter from July 2011 until November 2011. (Exhibit 7) deVlugt was hired by Defendant as a Trade Compliance Analyst on December 13, 2011. On October 1, 2012, he became a Customer Compliance Analyst. On August 11, 2013, he became a Logistics Specialist. And on January 5, 2015, he became Operations Manager. (Exhibit 8) While Defendant has alluded to deVlugt being a Logistics Project Manager, his job title was Logistics Specialist up until the time he became Operations Manager. deVlugt had only been with Defendant a little over 3 years when he was promoted to Operations Manager. He had been an analyst up until August 11, 2013. deVlugt did not have 3 to 5 year's experience in a Logistics and Operational management role and a minimum of 3 years of increasingly responsible experience, including experience successfully managing various projects, but he was given the position.

It is clearly discriminatory to expect Jones to meet the requirements of the job description, but to waive the requirements for deVlugt, the substantially younger male.

Defendant compares the performance appraisal of deVlugt and Jones for the period of July 2013 to June 2014. Jones was the Operations Manager and deVlugt was called the Logistics Project Manager. Jones was reviewed by Woods and deVlugt was reviewed by Dickson. Jones was given an overall Fully Met Expectations and deVlugt was given an overall Exceeded Most Expectations. (Defendant's Exhibits C-5 and C-6) This is not a comparison of similar positions and supervisors. A better comparison is the June 10, 2015, performance evaluation when deVlugt received a Fully Met Expectations from Dickson for the Operations Manager position. (Exhibit 12)

As stated above, deVlugt only served as an Information Technology Recruiter for about 4 months and the reason he had more knowledge of Simparel is because he was the only person on the team given the training. According to Woods, deVlugt was provided opportunities by Dickson which were not given to the other members of the team, all of which were women, including Jones. (Exhibit 4, Pages 22-24)

Defendant's business is seasonal, with Fall being the busy part of the year. (Exhibit 2, Page 78) deVlugt's first busy season was Fall 2015, which according to CEO Tunney was "horrible". (Exhibit 2, Pages 21-22) Woods testified that deVlugt did not spend the necessary time in California with UTi, as there was a need for boots on the ground. (Exhibit 4, Pages 35-36) Tunney and Evans blame the problems in Fall 2015 on UTi being involved in a change of ownership, resulting in new people being placed on Defendant's account (Exhibit 2, Page 23-24; Exhibit 5, Pages 21-22), but Woods contributes it to "freshman teams" on both sides of the business. (Exhibit 4, Page 37) In the end, Dickson was terminated from his position, because of the problems with UTi. (Exhibit 2, Page 43; Exhibit 3, Pages 49-52; Exhibit 5, Pages 22-24) Dickson had worked three busy seasons with Jones, but the first year he works with deVlugt problems arise and he is terminated.

There is a genuine issue of material fact as to whether deVlugt was qualified for the position of Operations Manager.

D. Defendant has a pattern of discrimination against older "seasoned" employees.

Jones is not the first employee to file an age discrimination lawsuit against Defendant. In 2012, George Papilaris filed a lawsuit claiming he was terminated as a result of his age and detailed in his complaint the comments and actions of CEO Tunney towards older employees that CEO Tunney referred to as "seasoned." (Exhibits 14 and 15) CEO Tunney testified that when he was hired at Defendant he set out to work on the culture of the company. (Exhibit 2, page 8) In his lawsuit, Papilaris describes an

October 17, 2012, monthly company-wide Key Performance Indicators (KPI) meeting, in which CEO Tunney addressed "rumors" that he was engaging in a purge of older workers. CEO Tunney addressed the age profile of the company's workforce and explained the company was top-heavy with "seasoned" employees when he was hired in 2006. CEO Tunney declared at the 2012 meeting that the company was more balanced with "seasoned" employees making up only about one-third of the workforce. Papilaris believed he was one of the "seasoned" employees terminated, demoted, or forced into retirement in the company's move towards a younger workforce. (Exhibit 15, Paragraph 31) CEO Tunney admits that he uses the term "seasoned" employees all the time. (Exhibit 2, Pages 56-57) CEO Tunney testified there were approximately 150 employees when he began at Defendant and there are currently 150 employees, but the workforce is substantially younger. (Exhibit 2, Page 8)

Woods remembers the KPI meeting described above and also recounts a conversation with CEO Tunney when he expressed concern regarding how many older people worked for Defendant. (Exhibit 4, Page 43) Woods also testified about another employee Pat Conley being unhappy that she was called out during a KPI meeting for being a "seasoned" employee. (Exhibit 4, Page 42) Finally, Woods states that it was not just one-time that CEO Tunney talked about older workers. (Exhibit 4, Page 49)

Jones has raised a genuine issue of material fact as to whether Defendant exhibited a pattern of discrimination towards older workers.

E. The January 2015 reduction in force, showed a pattern of removing women from positions and giving those positions to men.

On January 5, 2015, CEO Tunney sent a message to all the employees of Defendant regarding the significant challenges that fiscal year which resulted in Defendant acting under Code RED and having to realign staff (Exhibit 10), which he claims was prepared by Human Resources (Exhibit 2, Page 26). CEO

Tunney testified that during his 11 years with Defendant there had been 4 or 5 Code REDs (Exhibit 2, Page 32) and the company made adjustments all the time (Exhibit 2, Page 33). He stated that Human Resources refers to the adjustments as reductions in force, but he does not use that term. (Exhibit 2, Page 11)

According to the notice (Exhibit 10), the Designer position held by Brenda Kelso was eliminated. The Channel Management position held by Greg Hartland was eliminated, but he was not terminated. Instead, Tamara Olsen's position was moved to Ohio and given to Hartland. CEO Tunney testified Olsen was in California and Defendant offered her a job to move to Ohio to accept the Sales position, but she was not willing to relocate. (Exhibit 2, Page 35) Olsen has submitted a declaration in which she testifies she asked to move to Ohio at her own expense, but the offer was refused and the job given to Hartland. (Exhibit 6) With the elimination of Hartland's position, Matt Kieffer was promoted from temporary to full-time status in Channel Management. The notice states that Jones retired on December 31, 2014, and deVlugt was assigned her duties. Finally, the notice congratulates each on their new positions. The only people who lost their positions in this reduction in force were the women.

Just as he claimed about Olsen, CEO Tunney testified that Jones would have had a job if she moved to Ohio, but she would not move. (Exhibit 2, Page 40) He claims the Operations Manager position needs to be in Ohio (Exhibit 2, Pages 14 and 24) and he mentioned many times to Jones about moving to Ohio (Exhibit 2, Page 16). He claims he offered until her last day to continue her employment if she moved to Ohio. (Exhibit 2, Pages 17-18) CEO Tunney also claims Jones was in Ohio on her last day and they hugged and he offered her continued employment. (Exhibit 2, Pages 18 and 81) This did not occur, because Jones was unexpectedly terminated over the telephone on January 2, 2015, and never came to Ohio.

In its position statement to the EEOC, Defendant claims Jones was terminated because she would not move. (Exhibit 13) Defendant does not raise this claim in the motion for summary judgment, because the testimony from the managers as to this claim is inconsistent. Dickson testifies that relocation of Jones to Ohio or California was expected "down the road," but there was more need for her in California than Ohio. (Exhibit 3, Pages 10-11) Evans testifies he stopped asking Jones to move about a year before she was terminated. (Exhibit 5, Page 15) He agrees with Dickson that relocation would have been to Ohio or California. (Exhibit 5, Page 11) Evans states that Jones would not have been able to remain employed in January 2015, if she agreed to move (Exhibit 5, Page 26), because the time had passed for her to move (Exhibit 5, Pages 36-37). Defendant even claims in its position statement to the EEOC that Kalucis, Senior Vice-President of Human Resources, told Jones after the termination that she could continue to be employed if she moved. (Exhibit 13) Jones agrees there were some discussions of moving soon after the San Angelo, Texas Distribution Center was closed, but she denies having such a conversation with Kalucis after her termination. (Exhibit 1, Pages 25-27, 32-33, 73-74)

The only thing clear from the testimony is there was no real plan for Jones to move. There was not even a consensus as to whether she would be asked to move to Ohio or California. It may have been considered, but it never reached the stage where Jones needed to make a decision about moving. Jones was never told she was going to be terminated if she did not move. The claim about moving was an attempt to cover up the real reason for her termination - the position was being given to deVlugt.

This reduction in force was not the only incident where women were treated less favorably than men. In addition to the previous discussion about deVlugt receiving more opportunities than the women on his team, Woods testifies about other women who raised complaints of discrimination to her and Human

Resources, including Tamara Kellogg, Kara Daley, Pat Conley, and Neva (last name unknown). (Exhibit 4, Pages 41-42)

Jones has raised a genuine issue of material fact as to whether Defendant exhibited a pattern of discrimination towards women.

3. Summary Judgment Evidence

Exhibit 1	Sandra Jones deposition excerpts
Exhibit 2	Greg Tunney deposition excerpts
Exhibit 3	Chris Dickson deposition excerpts
Exhibit 4	Kathleen Woods deposition excerpts
Exhibit 5	Glenn Evans deposition excerpts
Exhibit 6	Tamara Olsen Turcany declaration
Exhibit 7	Seth deVlugt Employment Application
Exhibit 8	Seth deVlugt Human Resources documents
Exhibit 9	Operations Manager Statement of Position Responsibility
Exhibit 10	Greg Tunney announcement January 5, 2015
Exhibit 11	Seth deVlugt promotion document January 5, 2015
Exhibit 12	Seth deVlugt Performance Review Form June 10, 2015
Exhibit 13	R.G. Barry Corporation statement to the EEOC
Exhibit 14	George Papilaris declaration
Exhibit 15	George Papilaris Amended Complaint and Jury Demand

4. Arguments and Authority

A. Defendant made erroneous statements to the EEOC which is evidence of discrimination.

Erroneous statements made by a defendant in its EEOC position statement may be viewed as circumstantial evidence of discrimination. *Miller v. Raytheon Co.*, 716 F.3d 138, 144 (5th Cir. 2013). An employer's rationale is suspect when it does not remain the same between the time of the EEOC's investigation and the ultimate litigation. *Burrell v. Dr. Pepper/Seven Up Bottling Grp., Inc.,* 482 F.3d 408, 415 (5th Cir. 2007).

In their position statement to the EEOC (Exhibit 13), Defendant states that Jones understood based on prior conversations with Evans and Dickson that if she ever desired to relocate, Defendant would have continued to employ her and claims that Kalucis mentioned this to her after the termination. These statements to the EEOC are false, according to the testimony of Evans and Dickson. The decision was made in December 2014, to terminate Jones by telephone on January 2, 2015. If it was true that she could relocate and keep her job, that would have been discussed in the telephone call on January 2, 2015, but it was not.

Now Defendant claims Jones is not qualified for the new Operations Manager position. This contradicts Defendant's claim that Jones could have the position if she moved to California or Ohio.

B. Jones has established a prima facie case of age and sex discrimination.

Defendant claims Jones cannot establish a prima facie case of discrimination, because she is not qualified for the Operations Manager position and the new Operations Manager position is not similar to the old Operations Manager position.

Defendant basis its allegation that Jones is not qualified for the position on the requirements in the new Statement of Position Responsibility for the Operations Manager position adopted in December 2014. On the other hand, Defendant claims deVlugt is qualified for the position even though he does not meet the requirements stated in the Statement of Position Responsibility. If deVlugt is considered qualified for the position without meeting the requirements of the position, the same is true for Jones.

If a jury disbelieves defendant's argument that plaintiff was treated the same as younger employees, this is circumstantial evidence of age discrimination. *Uffelman v. Lone Stare Steel Co.*, 863 F.2d 404, 408 (5th Cir. 1989).

Jones has established a prima facie case of discrimination by showing that she continued to possess the necessary qualifications for her job at the time of the termination. Jones performed the duties and met all the expectations of the company, according to her performance review (Defendant's Exhibit C-5), up until the time of her termination. Defendant claims it would have continued to employ her in the position if she had moved to California or Ohio, which is also evidence she was qualified for the position.

Jones disputes that Defendant consolidated responsibilities and redefined the Operations Manager position, therefore the new Operations Manager position is not a similar position as required to establish a prima facie case.

Defendant asserts Jones was focused largely on helping UTi with day-to-day shipping operations, while deVlugt was focusing on supply chain financial and operational expectations. Defendant created a Statement of Position Responsibility for the position of Operations Manager in December 2014. (Exhibit 9) Defendant did not produce a similar Statement of Position Responsibility for the Operations Manager position before December 2014, so a direct comparison cannot be made between what Defendant classifies as the old and new Operations Manager position. Contrary to Defendant's claims, the primary responsibility of the Operations Manager position as of December 2014 was the ongoing operational coordination and management of all distribution, warehousing and operations with UTi. The first duty and responsibility listed on the new job description is to act as primary interface for daily coordination between UTi and Defendant. (Exhibit 9)

Woods is in the best position to know what Jones did and what deVlugt did, because she supervised Jones when Jones was Operations Manager (Defendant's Exhibit C-5) and she took over the duties of Operations Manager when deVlugt quit in September 2016 (Exhibit 2, Page 50). Woods testifies that deVlugt took over the duties of Jones in January 2015, and there was no difference between what

Jones was doing before she was terminated and what deVlugt was doing after Jones was terminated (Exhibit 4, Pages 32-33)

It is well established that only a "very minimal showing" is required for an employee to satisfy the requirements of the prima facie case. *Harvey v. R.O. Evans Pontiac-GMC Co.,* 1999 WL 820388, 5 (N.D. Tex.); *Nichols v. Loral Vought Sys. Corp.,* 81 F.3d 38, 41 (5th Cir. 1996); *Amburgey v. Corhart Refractories Corp., Inc.,* 936 F. 2d 805, 811 (5th Cir. 1991). Under the *McDonnell Douglas* framework, Plaintiff must prove the necessary elements "by a preponderance of the evidence. . . Even if Plaintiff has not succeeded in meeting this burden of proof, if he has raised a genuine issue of material fact, he should survive summary judgment." *Amburgey,* 936 F.2d at 811, *quoting McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 92 S.Ct. 1817, 1824, 36 L.Ed.2d 668, 677 (1973).

C. Defendant has not presented a legitimate, nondiscriminatory reason for Jones's termination.

Defendant now claims Jones's position was eliminated as a cost-savings measure. However, if Jones would have moved to California or Ohio it would not have been necessary to eliminate her position as a cost-savings measure.

The evidence presented does not support Defendant's claim that Jones's position was eliminated. The evidence proves the position remained and was given to deVlugt.

"In appropriate circumstances, the trier of fact can reasonably infer from the falsity of [an] explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000).

D. Jones has established pretext.

Plaintiff can show pretext by showing the decision maker's explanation is disingenuous and inconsistent. *Gee v. Principi,* 289 F.3d 342, 347 (5th Cir. 2002). The evidence presented in opposition to the motion for summary judgment clearly prove the explanations provided by Defendant are disingenuous and inconsistent, which is pretext.

E. But for her age, Jones would not have been terminated and her sex was a motivating factor in her termination.

Defendant seems to imply that the "but for" standard is a "sole cause" standard, which is not true. The Supreme Court has held that a "but for" causation standard was not the same as a "sole cause" standard in a number of decisions. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n. 10, (1976). *Hazen Paper*, which is relied upon in *Gross*, does not establish a "sole cause" standard in the ADEA and in fact explicitly references that liability under the ADEA may follow even when there is liability under both the ADEA and ERISA where the employer's decision to fire the employee was motivated by both the employee's age and by his pension status. *Hazen Paper Co. v. Biggins*, 507 U.S. 604,613 (1993).

Defendant claims Jones cannot establish discrimination, because she testified about legitimate, nondiscriminatory reasons for her termination, beginning with she was terminated so deVlugt could remain employed. Jones does claim she was terminated so deVlugt could remain employed. (Exhibit 1, Page 8) Jones testified that deVlugt no longer had any job responsibilities, so it was necessary to find a position for him. Kalucis confirmed this when she told Woods that deVlugt's position was truly the one eliminated. (Exhibit 4, Page 40)

Giving Jones's position to deVlugt was another example of Defendant moving to a younger workforce. In addition, the January 2015, reduction in force clearly showed that if a position of a man was eliminated, he was given the position of a woman. In the end, only women were terminated in January 2015. There can be a "boys club" without including all men, especially if the excluded men are older.

Jones's comments about deVlugt being seen as "very educated," "handsome," and "knowledgeable" and being paid less are not contradictory to her claims of age and sex discrimination. deVlugt was seen in a light more favorable than Jones, because of his age and sex. His recent graduation from college was seen as more valuable than Jones's many decades of experience and he was considered more knowledgeable because of how he looked and talked. As a result of her age, Jones was paid more than deVlugt, which according to Defendant resulted in her termination.

Defendant claims CEO Tunney was not the decisionmaker in the termination of Jones, but the evidence clearly proves he set into motion the practice of terminating older employees and replacing them with younger employees through his repeated comments, as confirmed by Woods, about the number of "seasoned" employees in the company.

An ADEA plaintiff may establish that the defendant engaged in a pattern or practice of discrimination by showing "by a preponderance of the evidence that [the impermissible] discrimination was the company's standard operating procedure-the regular rather than the unusual practice. *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 302 (5th Cir. 2000) (quoting *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984)).

Testimony concerning "similarly situated employees and the reasons for their discharge [is] relevant in proving a pattern and practice of age discrimination." *Harpring v. Cont'l Oil Co.*, 628 F.2d 406, 409

(5th Cir. 1980) (citing Fed. R. Evid. 401 and 404(b)). Therefore, Jones has presented the facts from the lawsuit by Papilaris. (Exhibits 14 and 15)

In *Thornbrough v. Columbus & Greenville R.R. Co.,* 760 F.2d 633, 640-41 (5th Cir. 1985), the Court held:

> [i]n general, summary judgment is an inappropriate tool for resolving claims of employment discrimination, which involve nebulous questions of motivation and intent . . . Often motivation and intent can only be proved through circumstantial evidence; determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder.

F. The "same actor" inference does not apply.

"The `same actor' inference arises when the individual who allegedly discriminated against the plaintiff was the same individual who hired the plaintiff and gives rise to an inference that discrimination was not the motive behind plaintiff's termination." *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 228 n.16 (5th Cir. 2000).

In *Brown* and *White*, cited by Defendant, the plaintiffs were hired and then fired 4 or 5 years later. Jones was hired in 1982, when she was 25 years old and fired in 2015, when she was 58 years old.

In *Brown*, the court also held the "same actor" inference does "not rule out the possibility that an individual could prove a case of discrimination." *Brown v.CS Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996). The court has to look at the motivation surrounding the "same actor."

The court has to examine the circumstances surrounding the promotion of Jones to San Angelo Distribution Center Manager, including was there anyone else qualified for the position at the time. Jones was retained after the distribution center closed, because she was the only one who knew how to transition to UTi. (Exhibit 1, Page 36) Defendant needed Jones at the time the distribution center closed. Defendant also needed Jones at the time they terminated her employment, but they wanted to have a younger male in the position. Defendant claims Jones was treated more favorably than Horton, but Horton was not similarly situated to Jones because he never became Operations Manager.

G. Summary judgment is not proper in this case.

It is improper in the summary judgment process for a court to choose which testimony to credit and which to discard. Making such a determination is an improper weighing of the evidence by the court and results in resolving disputed issues in favor of the moving party. *Tolan v. Cotton* 134 S.Ct. 1961, 1866 (2014).

A nonmovant's statement may not be rejected merely because it is not supported by the movant's or its representatives' divergent statements. *Heinsohn v. Carabin and Shaw*, No. 15-50300, 2016 WL 4011160 (5th Cir. 7/26/16).

By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986).

At the summary judgment stage, a court may not make credibility determinations. *Chambers v. Sears Roebuck & Co.*, 428 F.App's 400, 407-408 (5^{th} Cir. 2011).

Based upon the accumulation of circumstantial evidence and the credibility determinations that are required in this case, "reasonable men could differ" about the presence of discrimination, so summary judgment should be denied. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5^{th} Cir. 1969)(en banc), *overruled in part on other grounds*, *Gautreaux v. Scurlock Marine, Inc.,* 107 F.3d 331 (5^{th} Cir. 1997)(en banc).

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 2016, I electronically filed the above and foregoing *Plaintiff's Response to R.G. Barry Corporation's Motion for Summary Judgment and Brief in Support* with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

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/s/ Malinda A. Gaul
MALINDA A. GAUL

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SANDRA JONES,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	**CASE NO. 5:16-cv-00154-OLG**
	§	
R.G. BARRY CORPORATION,	§	
	§	
Defendant.	§	

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Came on to be heard Defendant R.G. Barry Corporation's Motion for Summary Judgment and Brief in Support and Plaintiff's response. Upon review of the motion and response, the Court finds it does not have merit and should be DENIED.

IT IS THEREFORE ORDERED that Defendant R.G. Barry Corporation's Motion for Summary Judgment and Brief in Support is DENIED.

Signed this _______ day of ______________________, 2016.

____
ORLANDO GARCIA
UNITED STATES DISTRICT JUDGE